(13)

AUG 23 1941

CHARLES ELMORE CROPLEY
CLERK

No. 215

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

S. NATHAN & COMPANY, Inc.,
NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioners,

vs.

RED CAB, INCORPORATED,
FRANK BIRD TRANSFER COMPANY,
Respondents.

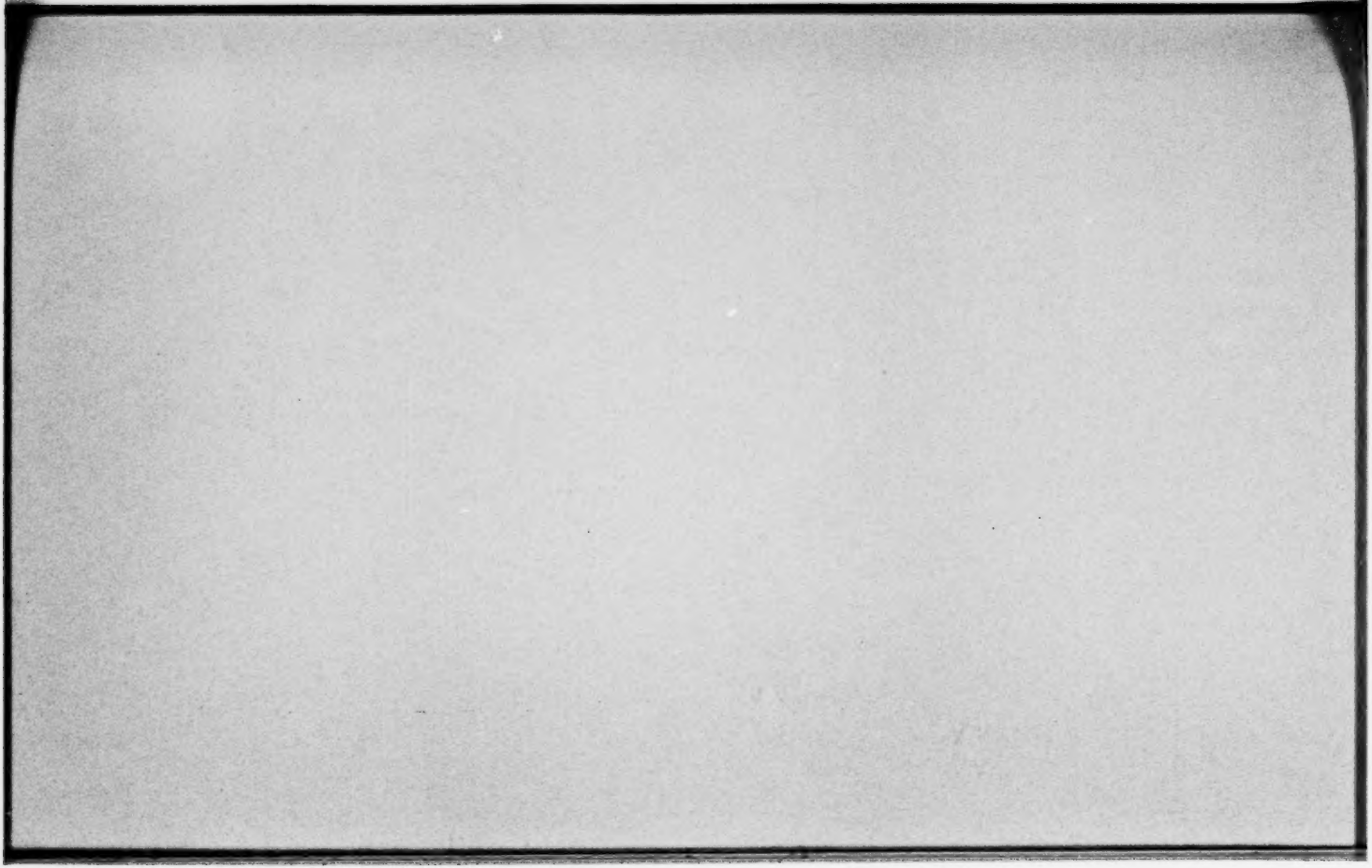
RESPONDENT'S BRIEF IN OPPOSITION TO PETITION AND BRIEF OF S. NATHAN & COMPANY, INC., NEW HAMPSHIRE FIRE INSURANCE COMPANY FOR WRIT OF CERTIORARI

JOHN C. RUCKELSHAUS,
JOHN K. RUCKELSHAUS,
WILLIAM E. REILEY,

Attorneys for Respondents,

Red Cab, Incorporated,
Frank Bird Transfer Company.

Central Publishing Company, Indianapolis, Ind.



INDEX

Page

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 7

LIST OF AUTHORITIES CITED

Doyle v. Kiser, 6 Ind. 242 6

Gilman v. Postal Telegraph Co., 95 N. Y. S. 564 (1905) 6

Harrington v. Wabash Railroad Company, 108 Minn. 257, 122 N. W. 14 (1909) 6

Humphreys, et al., v. Perry, 148 U. S. 627, 13 Sup. Ct. Rep. 711 (1893) 4, 5, 10

Illinois Central Railroad v. Fontaine, 217 Ky. 211, 289 S. W. 263 (1926) 4

McCahan Sugar Refining Company v. Wilderoft, 201 U. S. 378, 50 L. Ed. 794 (1906) 3, 6

McQuat v. Cook's Taxi Cab Co., 176 N. W. 763 16

Nathan v. Woolverton, 127 N. Y. S. 442, 134 N. Y. S. 469 ..... 5, 16

Robin v. Colaizzi, et al., 166 N. Y. S. 978, 101 Misc. Rep. 298 (1917) 5, 17

Rosenfeld v. The Peoria, Decatur and Evansville Railway Company, 103 Ind. 121, 124, 2 N. E. 344 (1885) 5, 14

Staub v. Kendrick, 121 Ind. 226, 229, 23 N. E. 79 (1889) 4, 6, 9, 16

Toledo, Wabash & Western Ry. Co. v. Hammond, 33 Ind. 379 6

Waters v. Beau Site Co., 186 N. Y. Supp. 731 17

Weiner v. Compagnie Generale Transatlantique, 61 Fed. (2d) 893 ..... 4, 5, 11

TEXTS

Page

American Jurisprudence, Vol. 9 S. 701 (1937)..... 5

Hutchinson on Carriers (3d Ed.), Volume One, Sections 330, 331 ..... 5, 14

Rules of Civil Procedure of the District Courts of the United States, No. 52..... 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

S. NATHAN & COMPANY, INC., NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioners,
vs.
RED CAB, INCORPORATED, FRANK BIRD TRANSFER COMPANY,
Respondents.
No. 215

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION AND BRIEF OF S. NATHAN & COMPANY, INC., NEW HAMPSHIRE FIRE INSURANCE COMPANY FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In addition to the statement set forth in the petitioner's brief the respondents would point out the following pertinent facts that were involved in this case.

S. Nathan & Company, a New York Corporation, was engaged in the sale of jewelery and had employed one Jack Teichlauf as a salesman. On the 29th day of September, 1936, Jack Teichlauf traveled from Cincinnati,

Ohio, by railroad train to Indianapolis where he arrived about midnight. The respondents at such time were conducting a "baggage" transfer business at the Union Station in Indianapolis. Upon his arrival a receipt was given to Jack Teichlauf, the representative of S. Nathan & Company, Inc., for his trunk by the respondents which receipt was labeled "baggage". (R. 18.) Later the truck containing this trunk while enroute from the Union Station to a downtown hotel was stopped by robbers who broke open the same and took the merchandise jewelry contained therein. The testimony of Kenneth Grant, who was the only representative of the respondents who saw the trunk prior to the time of this robbery, was that he noticed nothing unusual whatsoever about this trunk which would in anyway attract his attention, but on the contrary stated that it "looked like an ordinary trunk". (R. 59.) While the petitioners attempted to establish at the trial the fact that the trunk was of such a character as to advise the transfer company that it might contain jewelry, nevertheless the trial court found as a fact that there was nothing in the circumstances of this case which would have reasonably led the respondents to believe that they were contracting for the transportation of anything other than a trunk containing baggage. (R. 87.) Actually Teichlauf's trunk contained his employer's merchandise jewelry of a large value.

The respondents have repeatedly asserted in their petition and brief that there was no evidence or finding of the trial court to establish fraud on the part of the shipper. While the findings of the trial court did not expressly label the conduct of Jack Teichlauf under the circumstances fraudulent, unquestionably the facts found by such trial court amounted to fraud. For the trial court found from the evidence that Jack Teichlauf, a traveler

getting off of a railroad train at the Union Station, Indianapolis, turned over to the respondents his railway baggage check and requested that his trunk be transported to a local hotel; that there was nothing from the circumstances in this transaction which advised the respondents that the trunk in question contained anything other than baggage and "Said trunk was not of such a character or construction as to notify parties handling the same that it contained a large quantity of jewelry." (R. 87.) No statement was made by Jack Teichlauf which advised the respondents that such trunk contained a large quantity of jewelry or anything other than ordinary baggage. (R. 86.) The respondents did not know that the trunk contained such jewelry and were misled as to the nature of that which they were transporting.

Summary of Argument

I.

Under the circumstances, the respondents were common carriers and subject to a legal responsibility imposed on them as such.

II.

A finding by a District Court of a fact will not be disturbed on appeal if there is any evidence to support such finding.

No. 52 of Rules of Civil Procedure of the District Courts of the United States.

McCahan Sugar Refining Company vs. Wilderoft, 201 U. S. 378, 50 L. Ed. 794 (1906).

III.

Transfer company engaged in the business of transporting trunks containing baggage entering into a contract for the carriage of "baggage" is not responsible for the loss of a quantity of merchandise, namely: jewelry of large value, which jewelry may have been present in such trunk without the knowledge of such transfer company.

(1) A traveler who contracts for the transporting of his trunk by a transfer agency with an office at a railroad station to a hotel simply by presenting a railroad baggage check to such transfer agency and receiving in lieu thereof for a consideration a check labeled "baggage" has entered into a contract for the carriage of "baggage."

Staub v. Kindrick, 121 Ind. 226, 229, 23 N. E. 79 (1889).

(2) Merchandise Jewelry of a large value contained in the trunk of a traveler is not classed under the law as "baggage."

Humphreys, et al. v. Perry, 148 U. S. 627, 13 Sup. Ct. Rep. 711 (1893);

Wiener v. Compagnie Generale Transatlantique, 61 Fed. (2d) 893, 896, (C. C. A. 2d 1932);

Illinois Central Railroad v. Fontaine, 217 Ky. 211, 289 S. W. 263 (1926).

IV.

If a contract is entered into with a carrier for the transfer of a trunk containing baggage the additional fact that such contract may not have also provided for the transportation of the owner of such trunk would be of no conse-

quence and would not alter the responsibility of a carrier.

Wiener v. Compagnie Generale Transatlantique, 61 Fed. (2d) 893 (C. C. A. 2d 1932).

V.

A shipper which remains silent under such circumstances as to conceal from the knowledge of the carrier the true nature or value of goods to be shipped as freight or baggage is guilty of fraud on the carrier and will defeat the shipper's action for the loss of such goods or merchandise concealed.

Nathan v. Woolverton, 127 N. Y. S. 442-affirmed 131 N. Y. S. 1130 (1910), 134 N. Y. S. 469-affirmed 134 N. Y. S. 1140 (1912);

Rosenfeld v. The Peoria, Decatur and Evansville Railway Company, 103 Ind. 121, 124, 2 N. E. 344 (1885);

Humphreys, et al. v. Perry, 148 U. S. 627, 13 Sup. Ct. Rep. 711 (1893);

Wiener v. Compagnie Generale Transatlantique, 61 Fed. (2d) 893 (C. C. A. 2d 1932);

Robin v. Colaizzi, et al., 166 N. Y. S. 978, 101 Misc. Rep. 298 (1917);

Hutchinson on Carriers (3d Ed.), Volume One, Sections 330, 331 (1906);

American Jurisprudence, Vol. 9 S. 701 (1937).

VI.

A defense of fraud referred to above which provides a bar to an action for loss of merchandise by a shipper is not confined to a contract which provides for the transportation of such shipper as well as his trunk containing

merchandise, but also applies to a contract solely for the transportation of such trunk.

Gilman v. Postal Telegraph Co., 95 N. Y. S. 564 (1905);

Harrington v. Wabash Railroad Company, 108 Minn. 257, 122 N. W. 14 (1909).

VII.

The decisions of the trial court and Circuit Court of Appeals with respect to the question presented by this case are in harmony with the decisions of the state courts in Indiana where the transaction involved in this case took place.

Staub v. Kindrick, 121 Ind. 226, 229, 23 N. E. 79 (1889);

Doyle v. Kiser, 6 Ind. 242 (1855);

Toledo Wabash & Western Ry. Co. v. Hammond, 33 Ind. 379 (1870).

ARGUMENT

It is conceded that the respondents were common carriers and subject to the legal responsibility imposed on them as such. It is likewise conceded that the legal responsibility of the respondents as common carriers was ordinarily that of an insurer subject to a certain well recognized legal exceptions.

It should be noted that the petitioners are at this point again chiefly raising the contention that the District Court was not warranted in making certain of its findings of fact. The petitioners emphasize that the evidence in this case would require a finding that the respondents were engaged in the business of transporting more than what is commonly known as baggage. The parties stipulated at the time of the trial that the business of the respondents was the transporting to and from the Union Station at Indianapolis of what is commonly known as baggage. There was some little evidence that occasionally a salesman getting off the train at Indianapolis would arrange with the respondents to have his trunks or suitcases transported which might include a "sample" case. This court, of course, will recognize that such would be true in any railroad station in a city of any size in this country. But from all the evidence the trial court found that the respondents were engaged in the transportation of baggage and that the check given to Mr. Jack Teichlauf was labeled "Baggage" and finally that the respondents reasonably believed that they were transporting a trunk containing ordinary baggage and that there were no circumstances which would have reasonably led the respondents to think otherwise. At least it must be conceded

that the evidence was sufficient to warrant the District Court in making such a finding even though it might be urged that the testimony on the subject was conflicting. Rule 52 of Rules of Civil Procedure of the District Court of the United States provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

This, would properly be the position of this court when the record would disclose that this finding of the District Court was concurred in by Circuit Court of Appeals.

> W. J. McCahan Sugar Refining Company v. Wildcroft, 201 U. S. 378, 50 L. Ed. 794 (1906).

The same consideration pointed out above would likewise justify the finding of the District Court that there was nothing about the trunk in question which would advise the respondents of the fact that such trunk contained a quantity of merchandise jewelry of large value. The respondents petition and brief is almost entirely predicated on the assumption that we do not have presented by this case a situation where fraud or artifice of the shipper was proven or found by the District Court. While the District Court did not specifically label the circumstances of this case as one of fraud or artifice on the part of the shipper, certainly facts were found by the District Court which would legally amount to exactly that. Such facts having been found by the District Court and the record having presented some evidence to substantiate such findings it would seem of no consequence that the District Court did not specifically label such facts as legally constituting artifice or fraud.

The decision of the Circuit Court of Appeals can be sustained on the theory that the contract between the respondents and the petitioners was for the transportation of a trunk containing baggage. Teichlauf came to Indianapolis by railroad from Cincinnati. He went to the respondents desk located at the Union Station at Indianapolis, Indiana, and presented to such respondents' representative a railroad baggage check just as any other traveler would have done. The respondents took such check and, for a consideration, delivered to Teichlauf a receipt labelled "baggage." There was nothing about the nature of the trunk which was loaded on the respondents truck by one of its representatives which attracted such representative's attention. To him it looked like an ordinary trunk. It is fair to conclude from the above set of circumstances that this was a contract for the transportation of baggage.

The Indiana Supreme Court has concluded on an identical set of circumstances that the nature of such contract was one for the transportation of baggage. This question was presented to the Indiana Supreme Court in the case of Staub v. Kindrick (1889), 121 Ind. 226. In that case, Staub, the defendant, was engaged in the transporting of trunks and baggage in the City of Terre Haute to and from various hotels and railroad stations. Kindrick was a travelling salesman for a firm of wholesale hardware dealers. Immediately after his arrival at the Union depot, he engaged one of Staub's employees to convey his two trunks and valise to another railroad station in Terre Haute and paid him the price asked for transporting the same. Staub's employee took possession of the trunks and valise and gave Kindrick three checks for them. The valise containing a travelling salesman's illustrated catalog of the value of $50.00 was lost. In holding the

defendant liable for the value of the catalog the Court said:

> "It is a book used by him in the business in which he was engaged. He carried it with him for his personal use and convenience, and it is found to be a necessary article for him to carry to properly discharge the duties of the busines in which he was engaged and the object for which he was travelling."

In a further discussion of the reasons for holding the catalog to be "baggage" the Court enunciated the accepted common law definition of "baggage;"

> "It must on the whole be held, we think, that the book in question was an article of personal baggage within the definition above given and the decisions upon the subject. It was a thing of personal use and convenience to the plaintiff according to the wants of the particular class of travelers to which he belonged, and was taken with him as well with reference to the immediate necessities of his journey as to the ultimate purposes of it. It was not an article of merchandise of the like, or anything designed for use ulterior to the purposes of his journey, but a book of memoranda convenient and necessary for him personally in accomplishing the object of his travel. It was personal baggage, within the definition and rule of law upon the subject." (page 229.)

The authorities would seem to be clear that merchandise carried in a trunk or luggage of a traveler is not classified as baggage. This is particularly true of jewelry of a valuable character. A leading case on this question is Humphreys, et al. v. Perry, et al. 148 U. S. 627, 13 Sup. Ct. Rep. 711 (1893). In this case a traveling salesman for a firm of jewelers bought a ticket over the railroad of which defendants had been appointed Receivers. The salesman for the jewelry company received a baggage

check for his trunk, but said nothing with respect to its contents. The trunk contained a stock of jewelry from which sales were to be made to his employer's customers, but there was nothing of a definite character to indicate to the representatives of the railroad that such trunk contained a large quantity of jewelry. The car in which the trunk was placed was thrown from the tracks and the trunk and its contents were destroyed by fire. In holding that the railroad's liabiliy was only for personal baggage and that the value of the jewelry could not be recovered the Court said:

> "In the present case the trunk was offered as containing the personal baggage of a passenger. The passenger did not inform the baggage agent as to the actual contents of the trunk. The agent did not know what the trunk contained. There is no evidence that any agent of the receivers had theretofore received and checked a trunk as the personal baggage of a passenger, knowing that it contained a stock of jewelry; and it does not appear that any railroad company would issue a check to a passenger for a trunk, if previously informed that the trunk contained a valuable stock of jewelry."

On petition for rehearing of Wiener v. Compagnie Generale Transatlantique, 61 Fed. (2d) 893 (C. C. A. 2d 1932), the court said:

> "The words 'separate contract of affreightment' were used in the opinion because the plaintiff had not purchased a railroad ticket at the time when the special contract to carry the trunks from Havre to Paris was made. Therefore the contract was not strictissimi juris for the carriage of 'baggage' and was a special contract of affreightment. Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354, 36 L. R. A. (N. S.) 640; Sunders v. Southern Ry. Co. (C. C. A.) 128 F. 15. But we have not meant to say that the parties ever

> manifested an intention to have the obligation of a common carrier extend to belongings which could under no circumstances be considered 'baggage', unless their nature was disclosed. The surrounding circumstances of this case contravene the imposition of any such unlimited liability." (Page 896.)

The petitioners have placed great stress in their brief on the fact that the contract in question was not one calling also for the carriage of the person of a shipper as well as his property. While it is true that a passenger on a railroad train checking a trunk under ordinary circumstances is held to have contracted for the transportation of what is known as baggage, can it be reasonably contended that it is never legally possible under other circumstances to contract for transportation of baggage? The respondents have never assumed that Teichlauf was to be transported on the respondents truck with his trunk and his employer's jewelry. Nor have respondents assumed that there are not possible sets of circumstanaces such as were set forth in some of the decisions cited by petitioners where it could be fairly said that the contract was for transportation of something more than baggage. The respondents have urged, however, that under all the facts of this case it is proper to conclude that the respondents entered into a contract for the transportation of a trunk containing "baggage."

The decision of the Circuit Court of Appeals furthermore can be sustained on an entirely different theory, namely, that the facts of this case would amount to a fraud on the respondents of such a character as to provide a legal defense to petitioner's claim irrespective of whether the contract in question be construed as one for transportation of baggage or otherwise.

There are two decisions involving the petitioner, S. Nathan & Company, Inc., where the courts of New York have had occasion to pass on exactly this question. Once before this petitioner herein, or at least the firm of which this petitioner was the successor (R. 41) brought suit for valuable jewels checked in a trunk with the New York Transfer Company, which jewels were subsequently lost. The court in that case enunciated what would seem to be the law generally recognized with reference to our question. The New York court stated:

> "I cannot see how any other conclusion can be arrived at, if the contract is deemed complete when the check was delivered to defendant's agent and plaintiff took defendant's check. There is nothing about such a transaction to warn defendant, or in any way to indicate to him, that plaintiff's trunk was anything but ordinary personal baggage; nothing to indicate that, instead of receiving the ordinary personal apparel of the ordinary traveler, of very limited value, he was receiving a stock of merchandise of very large value. I do not think it can be presumed that travelers ordinarily carry baggage of such value or character as is here shown. Again quoting from Magnin v. Dinsmore:
>
> > " 'A shipper may become chargeable with fraud upon a carrier, through imposition and deception, as well when he is silent as when he speaks that which is untrue. A neglect to disclose the real value of a package, and the nature of its contents, if therewith there is that in its form, dimension, and other appearance designed, and, even if not designed, if fitted, to throw the carrier off his guard, will be conduct amounting to the fraud now spoken of. The intention to impose upon the carrier is not material. It is enough if such is the practical effect of the conduct of the shipper.'

> "When a check, without explanation, is presented to a carrier, it seems to me it cannot be disputed that it is tantamount to a representation that it is an ordinary trunk containing ordinary baggage; and, if it subsequently transpires, that the trunk in fact did contain a large amount of jewelry, it is a fraud upon the carrier which will relieve the carrier from liability. 6 Cyc. 668; Orange County Bank v. Brown, 9 Wend. 85, 24 Am. Dec. 129."

The Supreme Court of Indiana has given recognition to this doctrine of fraud. In Rosenfeld v. The Peoria, Decatur and Evansville Railroad Company, 103 Ind. 121, at page 124 (1885), the Court said:

> "If the shipper may, by false statements or artifice, deceive the carrier as to value, and thus get lower rates, and still recover from the carrier the full value, he is enabled to consummate a wrong upon the carrier which should not be sustained by the courts. Graves v. Lake Shore, etc., R. R. Co., 137 Mass. 33 (50 Am. R. 282); Hart v. Pennsylvania R. R. Co., 112 U. S. 331.
>
> "To hold the carrier liable in such a case for the full value of the article beyond the representation of the shipper, would seem to be neither just nor reasonable; and if neither just nor reasonable, such holding is not demanded by any considerations of public policy."

This rule recognized in the cases cited herein is well stated in Hutchinson on Carriers (3rd Ed.) Volume one, Section 330, as follows:

> "Sec. 330 (No. 213) Same subject—Neglect or failure to disclose contents or value. Fraud may be as effectually practiced upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package and the nature of its contents, if there be anything in its form, dimensions or other outward appearance as is calculated to throw the carrier off his guard, whether

> so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled. For by such deception the carrier is thrown off his guard and neglects to give to the package the care and attention which he would have given it had he known its actual value."

It should be noted that the District Court made the finding that the respondents were misled by the conduct of Teichlauf under the circumstances of this case. That finding the petitioners must recognize to be conclusive. So the respondents are thereby once again compelled to fall back on the contention that the legal principle of fraud is applicable only to cases where there is a contract for transportation of the person and his property not to a case where property alone is to be transported. Granted that fraud was present why the defense should be applicable in one case and not in the other is most difficult to ascertain. No decision cited by petitioners would support such a distinction. On the other hand, there are cases which have applied this doctrine of fraud to a situation where no carrier-passenger relationship is involved. An illustration is afforded in the case of Gilman v. Postal Telegraph Company, 95 N. Y. S. 564 (1905). The plaintiff called the defendant, Postal Telegraph Company, for a messenger to deliver a package which contained a substantial sum of money wrapped in a newspaper. No statement was made to the Postal Telegraph Company as to the contents of such package. The package was lost by the messenger boy. Suit was instituted for the recovery of the amount of money in question. The Court held that the

defendant was a common carrier, but had been deceived by failure of the plaintiff to advise the defendant that such package contained a sizeable amount of money. The Court in denying recovery in such case stated:

> "This, however, was not dealing fairly by the defendant; for if it was not intended to rely upon defendant's responsibility, no method or device should have been resorted to with a view to concealing the nature and extent of the responsibility sought to be imposed upon it." (At page 565.)

The decision of the Circuit Court of Appeals properly pointed out that the Indiana law would be controlling in a case of this character. The petitioners insist that the Indiana law is not in harmony with the decision in question. While it is recognized that these decisions referred to in the Circuit Court of Appeals decision do not squarely cover our situation, certainly the views expressed therein are in harmony with the opinion of the Circuit Court of Appeals and out of line with the theory urged by the petitioners. One of the cases cited by the petitioners is McQuat v. Cook's Taxi Cab Co., 176 N. W. 763, wherein the ~~Circuit~~ Supreme Court of Minnesota refers to the fact that the Indiana courts have followed the rule which was adhered to by the New York Court in the case of Nathan v. Woolverton, 127 N. Y. Supp. 442. The Minnesota court cited as evidence of its understanding that the Indiana rule was the same as that followed by the New York courts the case of Staub v. Kendrick, 121 Ind. 226.

The petitioners at the conclusion of their brief would insist that the case of Nathan v. Woolverton, 127 N. Y. Supp. 442, cited by the Circuit Court of Appeals, is contrary to earlier as well as later New York cases. It should

be noted that the New York courts do not concur in this conclusion urged by the petitioners. The Nathan case was first decided in 1910 and later affirmed in 1912. In the case of Robin v. Colaizzi, 166 N. Y. Supp. 978, decided in 1917, the Nathan case was cited with approval. Later in 1920, Waters v. Beau Site Co., 186 N. Y. Supp. 731, likewise specifies the Nathan case as the New York authority on the legal proposition with which we are here concerned.

The decision of the Circuit Court of Appeals can be sustained on the theory that no contract was entered into here for the transportation of anything other than baggage. While it is true that there is some authority in states other than Indiana which would hold a transfer company liable for articles in a trunk that might not ordinarily be construed as baggage, no case has been cited which would approach the extreme of holding that a transfer company was liable for the loss of merchandise of the value of $14,267.96, which jewelry, unknown to such transfer company, was present in a trunk of a traveler under the circumstances of this case. The decision of the Circuit Court of Appeals can on the other hand be sustained even if it should be concluded that this contract was for the carriage of a trunk not necessarily containing baggage. For the District Court properly found as a fact that the conduct of the shipper misled in a material way the carrier as to the nature of the articles which it was transporting. This conduct would constitute a fraud on the carrier and

would under the decisions both in Indiana and elsewhere constitute a legal defense to petitioners' action.

The petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN C. RUCKELSHAUS,

JOHN K. RUCKELSHAUS,

WILLIAM E. REILEY,

108 E. Washington Realty Bldg.,
Indianapolis, Indiana.

Attorneys for Respondents,

Red Cab, Incorporated,

Frank Bird Transfer Company.

(17)

SEP 6 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

S. NATHAN & COMPANY, INC.,
NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioners,
v.
RED CAB, INCORPORATED,
FRANK BIRD TRANSFER COMPANY,
Respondents.

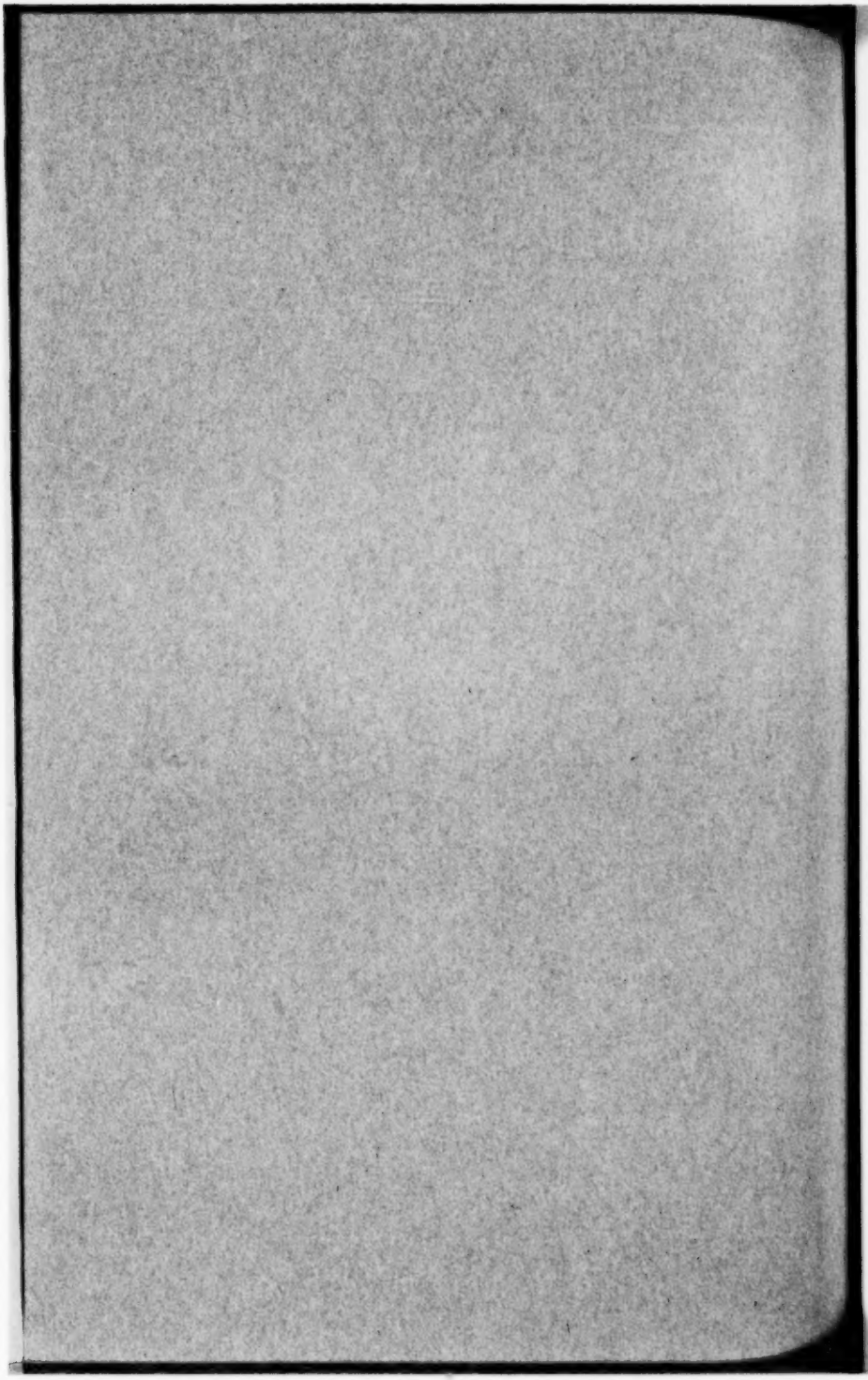
No. 215.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BURKE G. SLAYMAKER,
WILLIAM OTIS BADGER,
Counsel for Petitioners,
115 N. Pennsylvania St.,
Indianapolis, Indiana.

SLAYMAKER, MERRELL & LOCKE,
750 Consolidated Building,
Indianapolis, Indiana,

BADGER & LOCKWOOD,
116 John Street,
New York, New York,
Of Counsel.



SUBJECT INDEX

Page

Statement of the Case; errors of respondents in stating the record facts 1

Summary of Argument 4

Argument 6

Neither the express nor the implied contract was for the carriage of the personal baggage of a passenger. The express contract was for the carriage of a trunk as merchandise 6

Respondents were engaged as common carriers in transporting trunks and sample cases for commercial travelers 7

The implied representation of a passenger to a passenger carrier respecting a trunk to be carried as free baggage does not apply to the transportation of a trunk as goods by a transfer company engaged as a common carrier of goods for hire 8

Respondents' cases distinguished 9

The term "baggage" connotes merchandise in the case of a common carrier of goods for hire 10

The liability of a common carrier of goods for hire may not be limited merely by the shipper's failure to inform the carrier of the value of the goods to be carried 11